KOPERASI PASARAYA MALAYSIA BHD

v.

UDA HOLDINGS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUIT NO: S6-21-153-1997]
19 OCTOBER 2002

CIVIL PROCEDURE: *Government proceedings - Suit based on public nuisance - Whether must obtain consent of Attorney General - Failure to obtain consent - Whether fatal - Whether action to be struck off - Government Proceedings Act 1956, s. 8(1) - Rules of High Court 1980, O. 53*

The 1st defendant had constructed several stalls along a stretch of road in Kuala Lumpur ('the stalls') by virtue of a Temporary Occupational License ('TOL') issued to it by the 3rd defendant, the Government of Malaysia. Before constructing the stalls, the 1st defendant had obtained all the necessary approvals from the 2nd defendant, the Datuk Bandar, Kuala Lumpur. The plaintiff, who had a supermarket at the said road, did not object to the construction upon notice thereof being issued by the 2nd defendant. Subsequently, however, the plaintiff applied by way of a writ action for an order of demolition of the stalls, arguing that no valid TOL had been issued by the 3rd defendant. The defendants contended that the TOL was valid. Further, the defendants argued that the plaintiff's action was not properly instituted as the plaintiff, having based the action on 'public nuisance' within the meaning of s. 8(1) Government Proceedings Act 1956 ('the Act'), was duty bound but had failed to obtain the consent of the Attorney General for a relator action. Before the learned judge, a question arose as to whether it was incumbent on the plaintiff to have obtained the Attorney General's consent in question, and if so, whether its failure to do so was fatal to its case.

Held:

[1] The only way to invalidate the act of the 3rd defendant is by applying for an order of *mandamus*, prohibition or *certiorari* by way of judicial review. The procedure for making such applications are clearly stated under O. 53 Rules of the High Court 1980. (p 585 f)

[2] In the absence of any application for judicial review or for declaratory order in respect of the act of the 3rd defendant giving TOL to the 1st defendant, it is wrong to allege that the TOL was invalidly granted. In the circumstances, the administrative decision of the 3rd defendant was valid and enforceable. (p 585 h)

[3] In order for the plaintiff to bring an action based on public nuisance it must conform and comply with the requirements of s. 8(1) of the Act, including that the plaintiff must obtain the consent of the Attorney General for a relator action. The plaintiff had not obtained such consent and thus had not complied with the statutory provisions. Such failure is tantamount to a nullity and is incapable of being cured. The plaintiff's action before this court was clearly improper and the proceeding must be struck off. (p 587 e-f)

[Action struck off.]

Case(s) referred to:
Chong Sin Onn v. Kuching Municipal Council [1967] 1 MLJ 21 ***(dist)***
South Johore Omnibus Sdn Bhd v. Damai Express [1983] 1 MLJ 101 ***(foll)***

Legislation referred to:
Government Proceedings Act 1956, s. 8(1)
Road Transport Act 1987, s. 70(2)
National Land Code, s. 67
Rules of the High Court 1980, O. 53

For the plaintiffs - A Kanesalingam (N Jayakumar); M/s Kanesalingam & Co
For the 1st defendant - Zulkifly Nordin; M/s Zulkifly Nordin & Assoc
For the 2nd defendant - Victoria Martin; M/s Shook Lin & Bok
For the 3rd defendant - Abu Bakar Jais SFC

Reported by WA Sharif

JUDGMENT

Azmel Maamor J:
By way of a writ action the plaintiff claimed against the defendants as follows:

(a) Against the 1st and 2nd Defendants for an order that the 76 stalls be demolished and the public street restored to its former state immediately by the 1st and 2nd Defendants at the cost and expense of the 1st and 2nd Defendants and as against the 3rd Defendant a declaration that the said 76 stalls be demolished.

(b) An order that the 2nd and 3rd Defendants do immediately at their own cost and expense demolish or cause to be demolished the building known as Cawangan UMNO constructed on Lorong Haji Hussein Dua in front of City Park Hotel; and as against the 3rd Defendant a declaration that the said building be demolished;

(c) Losses;

(d) Interest on (c) at 8% per annum from the date hereof till full realisation;

(e) Any further on other relief as this Honourable Court deems fit; and

(f) Costs of this action.

It is to be noted that defendants no. 4 to no. 42 were included in their capacities as respective owners of the 76 stalls on Lorong Hj. Hussein Tiga.

The case was fixed for hearing on 6 December 1999. Counsel for the plaintiff; Encik A. Kanesalingam, in his opening remarks said:

> The TOL licence in the middle of the road is invalid. The approval was invalidly given.

Realising that the counsel for the plaintiff's remarks involved a very important question of law arising from this action I decided that it would facilitate the court proceedings if the counsel's allegation could be forthwith determined as a preliminary issue. The issue that I wanted to be determined was:

> Whether the granting of the Temporary Occupational Licence (TOL) on Lorong Hj. Hussein Tiga on which the 76 stalls were constructed was valid.

In the circumstances I instructed all the counsels involved in this case to furnish their written submissions in respect of the above preliminary issue. After having considered all the submissions furnished to me as well as other documents produced in court related to this issue I arrived at the conclusion that the said TOL on Lorong Hj. Hussein Tiga had been validly issued by the 3rd defendant to the 1st defendant.

Before starting to give my reasons for arriving at that conclusion I feel it is pertinent to state the brief background leading to the issuance of the TOL.

The 4th to the 42nd defendants had trespassed into and carried business activities on a piece of land known as Lot 2347 Jalan Raja Bot, Kuala Lumpur which belonged to the 1st defendant. The 1st defendant had commenced action for vacant possession against the 4th to 42nd defendants *vide* Kuala Lumpur High Court Civil Case No. S5-22-491-1997. Through a Consent Order dated

11 November 1997 the 4th to 42nd defendants agreed to vacate the said land in return for the 1st defendant offering them permission to carry out their business activities on temporary stalls constructed along Lorong Hj. Hussein Tiga.

The said 76 stalls were subsequently constructed by the 1st defendant on Lorong Hj. Hussein Tiga by virtue of a TOL issued to the 1st defendant by the 3rd defendant in accordance with s. 67 National Land Code. Before constructing the said stalls the 1st defendant had obtained all the necessary building approvals from the relevant departments of the 2nd defendant.

Through Warta Kerajaan No. 3775 dated 8 May 1997 the 2nd defendant had issued Notice under s. 70(2) Akta Pengangkutan Jalan 1987 informing affected parties of the proposal to close Lorong Hj. Hussein Tiga and requested any person who wished to make objection in writing to the said proposal. Similar notice had also been pasted at Lorong Hj. Hussein 3 opposite the plaintiff's supermarket. However the 2nd defendant had not received any specific written objection from anybody including the plaintiff. As such, the 2nd defendant issued Perintah Pengangkutan Jalan (Larangan Penggunaan Jalan) (Bandaraya Kuala Lumpur) (No. 6) 1997 prohibiting driving of any form of vehicles on Lorong Haji Hussein 3 wef. 14 August 1997 till 31 July 1999.

Since 12 November 1999 the 4th to 42nd defendants had taken possession and occupied the 76 stalls at Lorong Haji Hussein 3.

With those brief background I shall now state my reasons for arriving at the conclusion that the TOL was validly given. They are as follows.

Firstly, the TOL was given by the 3rd defendant to the 1st defendant. The 3rd defendant is Kerajaan Malaysia. An act of the Government (1st defendant) is deemed to be valid unless otherwise ordered by the court. The only way to invalidate an act or decision of the 3rd defendant is by applying for an order of *mandamus,* prohibition or *certiorari* by way of judicial review. The procedure of making such application are clearly stated under O. 53 of the Rules of the High Court 1980. There are of course cases where aggrieved parties can also apply for declaratory order against the act or decision of the 3rd defendant and the prayer must be in the form of a declaration. However, no such application either by way of judicial review under O. 53 of RHC had been made. Neither was there any application for a declaration seeking a court ruling that the TOL was invalid. In the absence of such application for judicial review or application for declaratory order in respect of the act of the 3rd defendant giving TOL to the 1st defendant on Lorong Hj. Hussein 3 it is wrong to allege that the TOL was invalidly granted. In the circumstances I ruled that the

administrative decision of the 3rd defendant was valid and enforceable. An appeal to the Court of Appeal against my ruling on this preliminary issue had been filed by the plaintiff.

I wish to point out that in the course of giving the submissions the counsel for the defendants had also prayed that the plaintiff's action be struck off because the nature of the main prayer filed by the plaintiff was for an order of demolition of the said 76 stalls by the 1st and 2nd defendants. As such the proper procedure to be taken by the plaintiff should be by way of judicial review under O. 53 of the RHC. However, I was quite reluctant to accede to their request for the simple reason that if the defendants had really intended to strike off the plaintiff's claims it would be necessary and proper for the defendants to file a formal application to that effect. I did not have before me such proper and formal application to strike off the plaintiff's writ and statement of claims by any of the defendants. In the circumstances I ordered the hearing of this action to proceed.

The plaintiff called its 1st witness, Mohd. Tahir bin Md. Hassan (PW1) who is the General Manager of the plaintiff. At the commencement of the hearing I requested counsels that evidence of witnesses must first of all be confined to prove the issue of liability. If liability has been proved then only witnesses are called to prove quantum of damages. My reason for making this request was basically to save time. There could be cases where issue of liability is not proved. In such a situation the hearing can be straight away concluded without the need to go to the 2nd stage of proving quantum of damages. All counsels did not raise any objection concerning any request in the manner the giving of evidence by witnesses was to be conducted.

After PW1 had completed giving his evidence on the question of liability Encik A. Kanesalingam applied for permission to allow PW1 to proceed straight away to prove damages. In the light of my earlier request I tried to stop from doing so and told him that if issue of liability is proved then PW1 can be recalled to prove damages. However Encik A. Kanesalingam insisted that PW1 be allowed to continue giving evidence in respect of proving damages suffered by the plaintiff. He said plaintiff's principal cause of action against the defendants was based on "public nuisance". And in order to prove public nuisance it would be essential to show "pecuniary damages" caused to the plaintiff. He referred to s. 8(1) of the Government Proceedings Act 1956 of the need to also prove pecuniary damages. He read s. 8(1) of the said Act in court.

In the light of the persistent request by Encik A. Kanesalingam and categorically admitting that the basis of the plaintiff's cause of action against the defendants (mainly defendants no. 1 to no. 3) was on public nuisance, I decided to stall further hearing in order to decide on another preliminary issue, that is, concerning the interpretation of s. 8(1) of the Government Proceedings Act 1956. Towards that purpose I instructed all counsels to give their written submissions in respect of the interpretation of s. 8(1) Government Proceedings Act 1956. Section 8 of the Government Proceedings Act 1956 states:

8. Public Nuisances.

(1) In the case of a public nuisance the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damages has been caused for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing on this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

(3) The powers of the Attorney General under this section shall, subject to any directions of the Attorney General, be exercisable by the State Attorney General.

After having considered counsels' submission on the issue I made the ruling that in order for the plaintiff to bring an action based on public nuisance, it must conform and comply with requirements under s. 8(1) of the Government Proceedings Act 1956. One of the requirement was that the plaintiff must obtain the consent of the Attorney-General for a relator action. And in this case it was my finding that the plaintiff had failed to comply with the requirements under s. 8(1) of the Government Proceedings Act 1956 in that the plaintiff failed to obtain the consent of the Attorney-General for a relator action. In my view, such failure tantamounts to a nullity incapable of being cured. In the circumstances I had no other choice but to order this proceedings be forthwith struck off with costs.

After having considered the provisions of s. 8(1) of the said Act, I was of the view that in order for the plaintiff to bring an action based on public nuisance, two requirements must be fulfilled. Firstly, it must show special damages arising from the public nuisance and secondly it must obtain prior consent of the Attorney-General for relator action to bring this suit.

Counsel for the plaintiff contended that under s. 8(1) the plaintiff is only required to prove pecuniary or special damages. There is no need for the plaintiff to obtain the Attorney General's consent to relator proceedings if it

can prove special damages. However counsels for the 1st, 2nd and 3rd defendants strongly contended that it is essential for the plaintiff to obtain the consent of the Attorney-General for a relator action to bring this suit.

In my view the relevant authority in respect of the construction of s. 8(1) of the Government Proceedings Act 1956 is found in the case of *South Johore Omnibus Sdn. Bhd. v. Damai Express* [1983] 1 MLJ 101. In construing s. 8 of the Government Proceedings Act 1956 YA Yusoff Mohamed J, (as he then was) said:

> In our country except in cases falling under section 80 of the Local Government Act, 1976, section 8 of the Government Proceedings Act, 1956 applies to relator action. The provision states:
>
> 8(1) In a case of a public nuisance the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.
>
> Having regard to this provision, in my view, if the Plaintiff can show that this suit is founded on public nuisance they can sue on the relation of the Attorney-General and not otherwise.
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> In *Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors.* [1979] 2 MLJ 127, Raja Azlan Shah CJ at 129, speaking on the application of section 8 of the Government Proceedings Act, and Local Government Act, 1976 (Act 171) says:
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> > In our view, the section speaks so plainly that it is clear from its terms that Parliament had intended to release a local authority from the obligation to sue on a relator action and not on their own, where they are taking proceedings at law to abate public nuisance on public or private premises within their own area in protection of the public interest.

Based on the decision of the *South Johore Omnibus* (above) it is essential that in Malaysia to institute an action based on public nuisance you must conform and comply with s. 8 of the Government Proceedings Act 1956. In order to bring an action based on public nuisance a plaintiff must not only prove that it had suffered special damages but also to obtain consent from the Attorney-General in a relator action. The plaintiff's action in the *South Johore Omnibus* case was dismissed because consent of the Attorney-General in a relator action was not obtained.

The plaintiff's action in this case as categorically admitted by the plaintiff's counsel was based on public nuisance. It is therefore essential that it must present its case on the basis of public nuisance. The term "public nuisance" is defined by *Clerk & Lindsell on Torts* as follows:

> A public nuisance is a criminal offence, and is "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

In this case since Encik A. Kanesalingam, counsel for the plaintiff had admitted that the plaintiff's action was based on public nuisance within the meaning of s. 8(1) of the Government Proceedings Act 1956 it is essential that it must satisfy the court that it has complied with the requirements of s. 8 of the said Act. However, the counsel for the plaintiff contended all the plaintiff needed to do was to prove that the plaintiff suffered special damages. And there is no need for the plaintiff to obtain the consent of the Attorney-General for a relator action.

In support of its case the plaintiff had referred to the case of *Chong Sin Onn v. Kuching Municipal Council* [1967] 1 MLJ 21 where the plaintiff sought a declaration against the defendant for causing obstruction by constructing a rail in front of the plaintiff's clinic between it and the street. The action was however dismissed because the plaintiff had not suffered any pecuniary damage.

In my view the authority cited by the plaintiff must be distinguished because nowhere in the judgment had the learned judge ever referred to s. 8 of the Government Proceedings Act 1956. Therefore the Kuching Municipal Council case could not support the plaintiff's argument because in the decision of that case no mention in respect of the interpretation of s. 8 had been made by the judge.

It must also be borne in mind that I had earlier on made a ruling that the TOL was validly granted by the 3rd defendant to the 1st defendant. Since there did not appear to be any written objections to the construction of the 76 stalls as well as the closure of Lorong Hj. Hussein 3 after the notice of the closure had been issued it can also be ruled that the 76 stalls were validly constructed and the closure of Lorong Hj. Hussein 3 was validly notified. Because there had been no application by any aggrieved party either by way of judicial review or declaration to set aside the grant of TOL by the 3rd defendant and also the construction of the 76 stalls by the 1st defendant as well as the closure of Lorong Hj. Hussein 3 by the 2nd defendant the validity of such acts remained effective.

In the light of the circumstances as I have stated above I arrived at the conclusion that the plaintiff failed to comply with the requirements of s. 8 of the Government Proceedings Act 1956 by failing to obtain consent of the Attorney-General to institute relator action. Therefore the plaintiff's action before this court was improper. As such I ordered that the plaintiff's action be struck off. I also ordered costs be paid by the plaintiff to the 1st, 2nd and 3rd defendants.